

William Powell *alias* Hinson Esq; *Plaintiffe*; *The Warden and Fellows of All-soules Colledge in Oxford Defendants.*

*In the Chancellors Court of the University of Oxford in a pretended Cause of Damage.*



His Suit is in the nature of an Action of the Case at the Common Law, and the end of this Action is the same with that of an Action on the case at Law, and that is to have a Reparation by way of damage for a wrong supposed to be done by the Defendants to the Plaintiffe.

The wrong complained of in the present Case is a preterition made by the Defendants of the Plaintiffe, in the renewing of a Lease for years of a Mesuage and Lands in *Wharley* in the County of Oxon, which Lease, as the Plaintiffe pretends the Defendants have to his damage renewed unto *George Herne*.

1. Wherein I do agree first that the Lease hath been so renewed by the Defendants to *George Herne*.

2. I do admit that this renewing was to the Plaintiffes damage.

But as I shall represent the truth of the Case to be; I conceive this damage so much complained of by this Action will fall out to be within the reason of those Cases of the Common Law, that being *damnum absque injuria*, there is no punishment of such Acts by any re. opence to be given in way of damage by any action whatsoever.

And therefore wheresoever a man hath liberty to do any act which no Law of the Land forbids, no Action at Law lieth against him for the doing of such an Act.

A Schoole-matter teaching Schoole in a Towne brought an Action upon the Case against another that afterwards set up a Schoole in

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the



11 Henry 4.  
Stat. in ac-  
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Case

the same Town whereby those Schollars that before gave him twenty pence a quarter, now will give him but twelve pence a quarter; and this being *damnum absque injuria*, it was adjudged that the Action will not lye.

21 of H. 6  
14. Bacon.  
sur le case,  
57. and 42.

So in the Case of a new Mill, erected upon the same streame, by a Lord of a Mannor, to the prejudice of the Lord of the next Mannor, who hath an ancient Mill standing upon the same streame, whereby the sure to the old Mill is lessened and withdrawn, yet this Action lies not, for albeit it be a damage to the Owner of the old Mill, yet it is *absque injuria*, there being no Law that makes such restraint either in the one case or in the other.

To apply this to the present Case, there are three Competitors to the Defendants for the renewing of the said Lease at *Whately*.

1. The Plaintiffe as Executor to Sir Edward Powell.
2. Mr. *Baceman*.
3. Mr. *George Herne*.

The Colledge being the Defendants, are not only not prohibited, nor under any restraint for the renewing of it, but are rather enabled by the Statute of 18. *Eliz.* the present Lease being run within three yeares of expiration, to renew this Lease to whom they please.

So as this being a power recommended to their own liberty, and being by them executed according to their power to them given by that Law, *legis executio non habet injuriam*, and no man can be said to do a wrong, *qui jure suo utitur*.

The Defendants are the more to be justified herein, for that they did not meerey as in act of power, nor inconsiderately renew it; but first calling in all parties, and suffering them to interplead before them, and hearing, and examining their reasons, *hinc & inde*, they did at length upon a full and deliberate consideration declare the right of renewing this Lease to belong to *George Herne*, and accordingly renewed it to him; wherein I conceive that both in Law and Equity they have done an Act that is most Collegiate, and such as best suits with the honour of their Colledge: and this will the better appeare by the Case it selfe as it stands in judgement upon the series and course of the Leases themselves made by their Predecessors of this Land now in question.

*Richard Powell* being in the yeare 1634. possessor of a Lease for years before that time made by *All-soules Colledge*, does in the said yeare 1634. without making any actuall surrender thereof, accept of a new Lease for yeares thereof from the said Colledge.

This his acceptance of the said new Lease is in Law an absolute surrender of that old Lease, albeit no actuall surrender were by him made

made of the said old Lease, and the neglect of the then Warden and Scholars of the said Colledge to take in the said old Lease is no hinderance at all to the operation of the said Surrender in Law.

Then doth *Richard Powell* in the year 1628. for 200. li. to him paid by *Bateman*, assigne this renewed Lease unto *Bateman*: this is a good assignment of a good Lease, then in being unto *Bateman*.

After this *Richard Powell* having still in his hands the said old Lease not actually surrendered, but yet determined by such surrender in Law (*as supra*) doth in the year 1639. for 240 li. paid by *George Herne* amongst other things grant the said old Lease, and the Lands thereby demised to the said *George Herne*, who presently redemised the said Lands unto the said *Richard Powell* at 40. li. rent *per annum*, and *Powell* still retained in his own hands the said old Lease.

The said *Richard Powell* afterwards in the year 1641. repaires to the Colledge, and concealing from them his said assignment to *Bateman*, and his said grant to *Herne*, without the privity or concurrents of the said *Bateman* and *Herne*, by their joyning with him in their making of an actual surrender of their, or either of their estates to the said Colledge, upon his giving in of the said old Lease made in the year of our Lord, 1626. obtaines a new Lease from the said Colledge to begin immediately, which he afterwards mortgaged to Sir *Edward Powell*.

1. The Lease renewed in 1634. to *Richard Powell*, then being Tenant in possession, and which he afterwards assigned to *Bateman*, was the only good Lease in the Case.

2. The grant to *Herne* of an old Lease then pretended to be *in eff.*, is not good in regard the Lease intended was determined by *Powell*'s acceptance of a new Lease in 1634.

3. The Colledge new Lease to *Richard Powell* in the year 1641. was void, for that the Lease to *Bateman* was then in being for many yeares then to come, and that Lease not then surrendered.

4. *Bateman*'s Lease comming afterwards within three yeares of expiration, the Colledge had then power to let a Lease to whom they pleased.

And they afterwards making this Lease to *George Herne*, this is a good execution of their power to them given by the Statute; and albeit a damage of the Plaintiffes expectation to renew, yet no injury at all to the Plaintiffe for the reasons before delivered.

And so no cause of Action to the Plaintiffe.

As to the objection that *Richard Powell* upon such his renewing in 1641. did pay to the Colledge 26. li. 13. s. 4. d. for a Fine.

It is answered, if any such money were by him paid for such a void

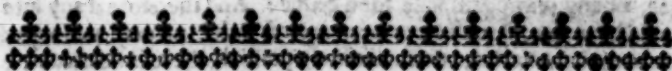
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Leasethen to him made, and by him afterwards assigned to Sir *Edward Powell* this 26.li. 13.s. 4.d. and the damages for the same, if any due to any person, is due in equity to the Executors of the said *Richard Powell*, who in his own wrong departed with that money and cannot at all be due to the Plaintiff as Executor of Sir *Edward Powell*, who as to that payment was and is a meere stranger to the Colledge, nor doth the now Plaintiff by his Libell make any claime thereunto.

26 Septem. 1656. Charles Holloway  
for the Defendants.

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*William Powell* Esquire, Plaintiff.

The Warden and Fellowes of *All-soules* Colledge  
in *Oxon*, Defendants, in the Chancellors Court  
of the Vniversity of *Oxon*, in a Cause of damages.

**T**Here is no cause why the Plaintiff should recover damages against the Defendants, for these reasons.

1. There is neither Law nor equity to compell them to Lease their land to any one; for it was lawfull for them to doe what they would with their own, observing this rule, *sic utere tuo ut alienum non ledas*, as here they did, for they did no hurt to Sir *Edward Powell* by making their Lease to *Heron*, but left Sir *Edward* as they found him.

2. *Heron* was first deceived, and it was good reason he should be first repaired, *Qui prior est tempore potior est iure*.

3. But if the Colledge had made the last lease to Sir *Edward Powell*, had not *Heron* as good equity to have sued the Colledge for damages, as Sir *Edward Powell*'s Executors pretends to now? certainly there had been *agnale jus*, if any there was at all in either side to sue the Colledge.

4. All the pretence for the Plaintiff, is, because his testator bought the last lease made in 1641. This in truth was no Lease, it being made void by Act of Parliament of 18. *Eliz.* in which every mans consent was had for him and his heirs, that such Lease should be void because the former was not within three yeers of expiration, which was unknown to the Colledge, but well known to *Richard Powell* the Lessee, who wittingly deceived himselfe, that he might cozen Sir *Edward Powell*, the Plaintiffs testator.

5. If the case were of a body naturall, and that the Plaintiff or his testator had sustained damage by it by an act done unawares (as here by making a void Lease) yet *ignorantia facti excusat*.

6. No crime can be imputed to a body politick aggregate, and this sute is brought against a body politick, and the charge of this Libell is grounded upon a deceit in making a Lease to a wrong man, which as is supposed, ought to have been made to the Plaintiffs testator. Now deceit is a crime, and a body without a soule (although it be *All-soules*) cannot be guilty of a crime, and so not be charged to pay damages

ages, or any way punishable for a crime: And therefore if any sute would have lien, it must have been against some naturall persons of that body; but to charge them as a body politick, there is no colour.

7. As for the fine paid to the Colledge for the void Lease, he paid it of his owne wrong, for *non decipitur qui scit se decipi*, he knew well he paid it for a void Lease, and on purpose to cozen some body with it, As appears by his so speedy putting it to sale to Sir Edward Powell. And it is cleer this *Richard Powell* (if he were living) could have no remedy against the Colledge to recover back this fine, for if he should, it would give countenance to such fraudulent practices which the Law abhorreth; and by like reason this *Richard Powell's* Executor, nor any claiming from him can be in better case to recover the fine back againe, then *Richard Powell* himselfe was; for *inulus derivativus* can be no better then *primitivus*:

November 8. 1656.

*Tym. Tournour.*

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William Powell alias Hinson Esquire, Plaintiff. The Warden and Fellowes of All-Soules Colledge in Oxford, Defendants.

In the Chancellors Court of the University of Oxford, in a pretended Cause of damage.

1. I Conceive that the Lease being void by an Act of Parliament, no remedy lies against the Colledge, because the Act which makes it void, gives no remedy, it being lawfull and valid before.

2. I conceive no remedy for this void Lease doth lie against the Colledge, because in such cases no remedy was ever given, or damages ever recovered; though many void leases have been made since the Stat. of 13. and 18. *Eliz.*

3. The Stat. of 18. *Eliz.* resolves the question, for that Stat. makes void all Bonds and Covenants entred into for making good such void leases. Now Bonds and Covenants cannot make the Lease valid that is void, but only give a satisfaction by way of damages; But by that Law such securities as found in satisfaction and damages, are made void; *à fortiori*, an equity imploid is void, for *equitas sequitur legem*.

4. And in truth, if an equity should be good against the Colledge to make satisfaction for the damages which such persons should sustain for want of an interest in law in the lands; then the Stat. *ex obliquo* must needs be evaded, and ecclesiasticall corporations in succession depauperated (the mischief solely intended to be remedied by the law) for the recovery of damages, being against the corporation, not against the naturall individuall persons, that made that Lease void, and received the benefit of the Fine, then it doth clearly follow though the corporation in succession enjoies the land and the profits of it, yet if they must yeild as much in damages, what is this more in effect, but receiving with one hand, and paying with another? And so the Colledge in succession is deteriorated in the matters provided against by the Parliament.

*Frustra petis quod statim reddere cogeris.*

5. Though the Colledge have collateral security to save them harmless; for what by law shall be recovered against them in such a case, if by law nothing can be recovered against them (though *de facto* there be an appearance of it) they shall never have any benefit of their collateral security, so the Colledge is the party politick against whom these damages must be effectually recover'd, and for a voluntary re-imbursement, it is no argument one way or other.

6. For the Court where this controversie is depending (*viz.* the

the University Court of *Oxford*, which Court cannot have jurisdiction in this cause for two reasons.

1. Because they have no jurisdiction but by ancient usage or Letters Patents. By usage they can have no jurisdiction in this Cause, because the ground of the question or controversie is upon the Stat. of 13. and 18. *Eliz.* there being no such case that could come in question before those Statutes. So not by ancient usage, and then not by Letters Patents, for they have no jurisdiction granted by Letters Patents herein since those Statutes.

And secondly, Because the King cannot create a Court of equity by Charter; and there is no Act of Parliament that doth confirm their jurisdiction herein, whether they will lay the foundation of their jurisdiction herein, either by ancient usage or Letters Patents, because the Act of Parliament by which the jurisdiction of the University Courts of *Oxford* and *Cambridge* are confirmed, and which doth confirme their jurisdictions formerly enjoied by usage or Letters Patents, is a Prior act, viz. (13 *Eliz.*) to the Act of Parliament upon which this question doth properly arise, viz. 18. *Eliz.*

7. Admit they have a jurisdiction of the cause, yet they must judge *secundum legem terra* according to the Law of the Land, and not according to the civill Law not formerly used in *England*.

1. Because no part of the Civill Law is of force in *England* (not in the Ecclesiastical Courts of *England*) but what hath been anciently used in *England*, and is thereby become the Law of *England*, and in truth so much of the civill Law as hath been anciently used in *England*, is the common Law of *England* in those cases.

2. Though the University Courts of *Oxford* and *Cambridge* do in *formula juris*, that is to say, in the method of their proceedings, seem rather to follow the ecclesiastical Courts, then the common law Courts & the advocats there are civilians, yet in truth they are no ecclesiastical Courts, but Courts of Law and equity mixt, established by usage, Letters Patents and Acts of Parliament, and their judgements and sentences doe bind the person and goods to execution, and are as the Court of the Marshes of *Wales* that were mixt of law and equity, and so though they have a peculiar jurisdiction in respect of the place, yet in their judgements and sentences they must judge *secundum legem terra*, as the superior Courts of Law or equity would do in those cases.

From all which I conclude that the University Court of *Oxford* cannot give damages against *All-Soules* Colledge in this case.

November 10. 1656.

George Starkey.